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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**

14 RAYMOND J. SMITH,

15 Plaintiff,

16 vs.

17 HUNT & HENRIQUES and
18 DOES 1-20, inclusive,

19 Defendants.

CASE NO. 5:12-cv-004150 HRL

PAINTIFF'S OPPOSITION TO
DEFENDANT'S ADMINISTRATIVE
MOTION REQUESTING PUBLICATION
OF COURT'S NOVEMBER 21, 2013
ORDERS

The Honorable Howard R. Lloyd

20 **I. INTRODUCTION**

21 On November 21, 2013, this Court entered an Order granting summary
22 judgment in favor of Defendant, Hunt & Henriques ("H&H"), and a Motion for
23 Sanctions against counsel for Plaintiff, Raymond Smith. This Court classified
24 the Orders as "Not For Citation" under Civil L.R. 7-14 to limit the universe of
25 citable cases. On December 2, 2013, Defendant filed an administrative motion
26 requesting removal of the "Not For Citation" designation in conflict with this
27 Court's express intention.
28

1 Plaintiff respectfully requests that this Court deny H&H's bid to remove
 2 the "Not For Citation" designation on the Orders granting summary judgment
 3 for Defendant and awarding sanctions under Rule 11 of the Federal Rules of
 4 Civil Procedure.

5 It is strictly within the sole discretion of the Honorable Howard Lloyd to
 6 classify the Orders as "Not For Citation," and this decision should be respected
 7 by H&H. Furthermore, removal of the "Not For Citation" designation on the
 8 November 21, 2013 Orders would be inappropriate in light of the considerable
 9 Ninth Circuit Court decisions that satisfy H&H's professed objective. While
 10 the opinions at issue are unfavorable to the Plaintiff, the decisive aspects are
 11 specific to the facts and procedure of the particular case. There is no novel
 12 issue of law warranting the inclusion of such opinions into the larger body of
 13 law.

14 II. ARGUMENT

15 A. The Court's "Not For Citation" Designation of the Orders Should 16 be Respected

17 Civil L.R. 7-14 for the Northern District of California provides, "**It is**
 18 **within the sole discretion of the issuing Judge to determine whether an**
 19 **order or opinion issued by that Judge shall not be citable.**" The plain
 20 language of the rule clearly grants the presiding judge broad discretion in
 21 deciding whether a case shall be citable. Because the Honorable Howard Lloyd
 22 expressly elected to designate the case as uncitable pursuant to Civil L.R. 7-14,
 23 that determination should be respected by H&H.

24 In addition, Civil L.R. 3-4(e) already provides exceptions to the prohibition
 25 of citation to uncertified orders and opinions. The Rule states, "Any order or
 26 opinion that is designated: 'NOT FOR CITATION,' pursuant to Civil L.R. 7-
 27 14... may not be cited to this Court, either in written submissions or oral
 28 argument, *except when relevant under the doctrines of law of the case, res*

1 *judicata or collateral estoppel* [emphasis added].” The drafters of the Local
 2 Rules for the Northern District of California plainly intended limited
 3 exceptions for the use of uncertified opinions or orders. H&H’s Motion serves
 4 to undermine this Court’s standing conclusion and circumvent the purpose of
 5 Civil L.R. 3-4(e).

6 **B. Removal of the “Not For Citation” Designation is Unnecessary and**
 7 **Serves Only to Prejudice Plaintiff’s Counsel**

8 The removal of the “Not For Citation” designation on both of the Court’s
 9 opinions is unwarranted given the available legal authority. H&H seeks to
 10 establish citable precedent showing that a threshold issue for plaintiffs in a Fair
 11 Debt Collection Practices Act (“FDCPA”) action is whether the dispute
 12 involves a “debt” within the meaning of the statute. See Docket 66, lines 17-
 13 20. However, as H&H acknowledges, there are multiple cases within the Ninth
 14 Circuit that discusses this requirement. See, *e.g. Turner v. Cook*, 362 F.3d 1219
 15 (9th Cir. 2004); *Slenk v. Transworld Sys.*, 236 F.3d 1072 (9th Cir. 2001). The
 16 decisions of the Ninth Circuit Court have binding effect on federal district
 17 court decisions and are readily available for members of the collection industry
 18 to utilize. Thus, citation to a district court opinion will have no greater
 19 precedential effect than a Ninth Circuit Court opinion.

20 Because the determination to classify the Orders as “Not for Citation” is
 21 within the sole discretion of the presiding judge, the factors employed by the
 22 California state courts under Rule 8.1105 of the California Rules of Court have
 23 no binding authority on this Court. Nevertheless, none of the factors under
 24 Rule 8.1105 support the removal of the “Not For Citation” designation on the
 25 November 21, 2013 Orders. The Orders do not raise new legal issues, but rely
 26 on legal precedent established by Ninth Circuit Court. Furthermore, the basis
 27 of the court’s decision is the view that Plaintiff Smith lacked evidentiary
 28 support for his claims, not the application of the FDCPA to the Plaintiff’s

1 specific set of facts. There is no precedential value in the proposition that a
2 party needs evidence to support his or her claims.

3 In challenging the “Not For Citation” designation, H&H is simply
4 attempting to prejudice Plaintiff’s counsel. As a debt collector, the only
5 purpose in citing to the present case would be to discredit the Plaintiff’s
6 counsel by referencing a prior unfavorable disposition from an entirely separate
7 transaction.

8 Because there is “abundant evidence of the use of abusive, deceptive, and
9 unfair debt collection practices by many debt collectors,” FDCPA 15 U.S.C. §
10 1692(a), Congress enacted the FDCPA with the objective of preventing such
11 activities by debt collection agencies. FDCPA 15 U.S.C. § 1692(e). Allowing
12 debt collectors the opportunity to evade statutory responsibility is contrary to
13 the Congressional intent behind the strict liability consumer protection statutes.
14 Revocation of the “Not For Citation” designation would prejudice Plaintiff’s
15 counsel and all prospective, similarly-situated plaintiffs, necessarily increasing
16 debt collectors’ likelihood of avoiding liability for violations of the FDCPA.

17 **C. A “Debt” as Defined by the FDCPA Exists in the Perez and Nolasco**
18 **Actions**

19 H&H attempts to bolster its argument for removing the “Not For
20 Citation” designation by misleadingly implying that the clients of Plaintiff’s
21 counsel must prove an actual debt in order to prove the existence of a “debt” as
22 defined by the FDCPA. See Docket 66, lines 5-8. The term “debt” refers to
23 “any obligation or *alleged* obligation of a consumer to pay money arising out
24 of a transaction in which the money, property, insurance or services which are
25 the subject of the transaction are primarily for personal, family, or household
26 purposes, whether or not such obligation has been reduced to judgment
27 [emphasis added].” 15 U.S.C. 1692a(5). The plain language of the Act does not
28 require an actual obligation to pay but merely an alleged obligation. The

1 FDCPA is instead triggered when an obligation to pay arises out of a specified
 2 “transaction”, which involves some type of business dealing between parties.
 3 *Turner*, 362 F.3d at 1228 (adopting the rationale of *Hawthorne v. Mac*
 4 *Adjustment, Inc.*, 140 F.3d 1367 (11th Cir. 1998)).

5 In the *Joyce Perez* and *Natalie Nolasco* actions, the Plaintiffs’ causes of
 6 action are based upon various Defendants’ false representations to the major
 7 consumer reporting agencies of purported consumer credit card debts.
 8 Therefore, the Defendants in the respective actions placed a “debt” as defined
 9 by the FDCPA at issue when they reported inaccurate information about
 10 alleged debts to the major credit reporting agencies. The inaccurate information
 11 consisted of the character, amount, and legal status of alleged debts arising out
 12 of credit card transactions. When debts are sold, debt collectors typically
 13 acquire few details of the purchased account and obtain no guaranty that the
 14 debt is still valid.¹ It is the Defendants’ contentions that Plaintiffs Perez and
 15 Nolasco owe consumer debts despite no previous business transactions,
 16 business relationships, or contractual agreements that constitute violations of
 17 the FDCPA.

18 Moreover, H&H’s comparison of the present case to the *Joyce Perez* and
 19 *Natalie Nolasco* causes of action is deceptive. In the present case, the court
 20 Orders address Plaintiff Smith’s arguments from the position that Merrick

21
 22 ¹ The FTC Report from January 2013 titled “The Structure and Practices of the
 23 Debt Buying Industry” states that purchased information often includes
 24 spreadsheets containing a consumer’s name, address, social security number,
 25 original creditor, date opened, date charged off and balance at charge off but no
 26 documentation of the authenticity of the information. In addition, the FTC
 27 Report maintains that in many purchases and sale agreements, sellers disclaim
 28 all warranties and representation regarding the accuracy of the information they
 provide at the time of sale. Thus, the debt buyer knowingly purchases “as is”
 and is fully aware of the possibility that the information regarding an individual
 alleged account may be false or largely inaccurate.

1 Bank, an issuer of consumer credit cards, retained H&H, a law firm, to collect
2 an outstanding balance on Plaintiff Smith's Visa credit card. See Docket 62,
3 lines 12-13. In contrast, the Defendants in the *Perez* and *Nolasco* actions are
4 debt collectors in the business of buying bad debts. Consequently, the named
5 Defendants in those actions were attempting to collect alleged debts for their
6 own benefit rather than on behalf of an original creditor.

7 In effect, Defendant's counsel is asking the court to take judicial notice
8 of factual issues unrelated to the instant action, in violation of Federal Rule of
9 Evidence 201. Furthermore, Defendant is attempting to misdirect the Court
10 into considering facts that are beyond the scope of the instant action.

11 III. CONCLUSION

12 Plaintiff Smith maintains that H&H's challenge to the court designation
13 is an attempt to discourage Plaintiff's counsel from pursuing further federal
14 claims. In regards to the *Natalie Nolasco* and *Joyce Perez* actions, Plaintiffs
15 Nolasco and Perez have sufficient evidence to satisfy the threshold issue of
16 whether a "debt" as defined by the FDCPA exists and deserve to be heard on
17 their own merits. Nonetheless, reference to the Perez and Nolasco actions is
18 irrelevant and is another veiled attempt to prejudice plaintiff's counsel.
19 Therefore, for the forgoing reasons, Plaintiff Smith respectfully requests the
20 Court deny the Defendant's request to remove the "Not For Citation"
21 designation of the Orders issued on this action on November 21, 2013.

22
23 DATED this 16th day of December, 2013.

Respectfully submitted,

24 /s/ Jim Q. Tran

25 Jim Q. Tran

26 Attorney for Plaintiff
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